No. 86-1159

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,

Petitioners,

—against—

CENTRAL TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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February 18, 1987

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PRELIMINARY STATEMENT

Petitioners respectfully submit this brief in reply to the opposition brief filed by Respondent Central.

Central's opposition to the Petition does not address the serious issues raised by this case. Strikingly, Central seeks to avoid entirely the First Amendment issues on exclusive cable licensing and natural monopoly. As set forth below, those First

Amendment issues are unavoidable. Moreover, Central concedes that the questions presented by the Petition may well merit consideration by this Court. Central, however, argues that this is not an "appropriate" case in which to hear those issues, based on its implicit view that whatever the merits of TCI's legal position, however mistaken the Eighth Circuit may have been, TCI's "bad acts" are so reprehensible that this Court should reject the Petition out of hand. Thus, Central devotes the bulk of its opposition to highly colored reiterations of those "bad acts".

It nonetheless remains clear that the Petition does present pressing consitutional issues of great importance—issues that need prompt resolution by this Court. If the Eighth Circuit's decision is allowed to stand, the impact of its narrow view of First Amendment rights will clearly fall on TCI—and, contrary to Central's implication, will equally continue to haunt the burgeoning cable television industry. (*See* Petition at 13 n.18, 15-20)

ARGUMENT

I. THIS CASE PLAINLY PRESENTS A FIRST AMENDMENT ISSUE.

TCI, as a cable publisher, is entitled to the protection of the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986). In this case, however, the Eighth Circuit, applying a lower standard of First Amendment scrutiny to Jefferson City's regulation of cable speech, upheld the City's exclusive licensing scheme based upon the existence of a perceived "natural monopoly". (App. 10a-11a) The court of appeals' ruling put it in conflict with the Ninth and District of Columbia Circuits (and the Federal Communications Commission itself). The court also improperly limited the applicability of this Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to its specific facts. (Petition at 10-20)

Central never addresses those issues, but rather urges that the question of municipal regulation of cable television, and the

inherent First Amendment concerns, are "not presented in this case" because the Eighth Circuit has already held that TCI's "bad acts" deprived TCI of its First Amendment defense. (Brief for Respondent in Opposition ("Opp.") at 5-8)

The courts below and Central failed to appreciate that TCI's First Amendment "defense" is really a failure on Central's part, as a matter of law, to prove an essential element of its claim—that it was injured in a property interest cognizable by the antitrust and tortious interference laws. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." Section 4, therefore, grants recovery only to the extent of injury to "business or property". As the Court has noted, "injury" in this context "implies violation of a *legal* right". *Keogh v. Chicago & N. Ry.*, 260 U.S. 156, 163 (1922) (emphasis supplied). "[W]hether [plaintiff] has property within the meaning of the statute would appear to depend on whether what he possessed was deserving of legal protection." *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 634 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966). Thus, an inherently illegal business or property interest cannot be the subject of a Section 4 claim.[1] Whatever TCI's motives or conduct were, if Central's "property interest" is—as TCI contends—repugnant to the First Amendment, then the analysis *is at an end.*[2]

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[1] Because the invalidity of Central's business expectancy is constitutionally based, Central's recovery under Missouri tortious interference law is barred as well.

[2] This case is therefore not governed by *Associated Press v. United States*, 326 U.S. 1 (1945). There, no one questioned that the business or property interest claimed was a legal and proper one. *Associated Press* may mean that TCI's antitrust *conduct* is not necessarily protected by the First Amendment, but it does not mean that Central may seek recovery for a void property interest. Indeed, the suggestion of the Eighth Circuit that the courts will enforce an unconstitutional interest on account of the "bad acts" of another is so novel—and dangerous—as to suggest in itself the appropriateness of review by this Court.

The property interest alleged by Central in this case (and on which it recovered damages) was an exclusive cable television license—a property right that cannot exist consistent with the First Amendment protections on cable speech. In other words, unless the City Council *could* constitutionally grant an exclusive license to Central (the only property right it claims was injured), TCI's alleged anticompetitive conduct could not support a verdict in Central's favor. Thus, the First Amendment issue is unavoidable. For example, even if this had been a case alleging a conspiracy between the telephone company and the Mayor of Jefferson City to deny Central exclusive access to the utility poles, the First Amendment would still render Central's property interest unconstitutional—even without a cable speaker such as TCI as a defendant. It is the nature of the franchise at issue, as much as any status of TCI as a First Amendment speaker, that raises the constitutional issue. Obviously, if the franchise in question were one to collect refuse, instead of to engage in protected speech, there would be no similar obstacle to an exclusive franchise.

Similarly, contrary to Central's assertion, TCI's First Amendment argument does not hinge on TCI's claim that it did not seek to block competition. (Opp. at 7) Central recognizes that if the jury found that the Jefferson City cable television market was a natural monopoly, the First Amendment issue is presented. Central contends, however, that the jury, under the instructions given to them, could have found that the market was not a natural monopoly and that TCI did not prevent competition *for* the market, but rather restrained competition *in* the market. (Opp. at 7-8; App. 50a-55a) First, this case did not go to the jury on a theory that TCI thwarted Central's attempt to compete with TCI *in* the Jefferson City market—Central made it clear it would not compete in the market and offered no damage theory for anything other than its being deprived of an *exclusive* license. Yet, even if the jury could find, as the district court believed it did, that TCI engaged in predatory conduct "with respect to competition in the market" (App. 55a), such conduct cannot render constitutional Central's otherwise unconstitutional property interest in being the City's sole cable

publisher. Again, the issue is not what TCI did, but whether Central ever made a claim for a constitutionally cognizable interest.

Central also argues that the Court should avoid resolving this First Amendment issue in a case between private litigants without participation of the municipality, even though the Eighth Circuit clearly reached the issue. (Opp. at 9) The court of appeals adopted TCI's statement of the First Amendment issues presented by the case, devoted several pages to a review of those issues, noted that its decision posed "profound first amendment implications" for cable operators, and specifically held that Central did have a protectable interest in being Jefferson City's sole cable speaker because it proved "that the 'natural monopoly' characteristics of the Jefferson City cable market justified the City in offering a de facto exclusive franchise. . . ." (App. 4a-11a) The record was fully developed as to the RFP process and the City's concerns with granting multiple licenses to cable operators. Numerous City officials testified at trial and the licensing process was examined in great detail. Central points to nothing lacking in the presentation of evidence that a municipal defendant would have provided.

Central nonetheless urges the Court to overlook those pressing First Amendment issues, to ignore the conflict among the circuits, and to wait for what Central terms a more "suitable" case. (Opp. at 9) Every opponent of a petition surely hopes that the Court will wait for another day, another case. TCI respectfully submits, however, that the First Amendment issues presented by the Petition will *not* wait for another day—without serious damage to TCI and free speech in the interim.[3]

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[3] In the Petition, TCI cited a number of pending cases that involve the issue of cable speakers' First Amendment rights. (Petition at 13 n.18) Central points to those pending cases to suggest that "there will be no shortage of suitable cases" in which the Court can resolve that issue—an issue that Central concedes "may well merit consideration by this Court in an appropriate case". (Opp. at 9, 5) Those "suitable", "appropriate" cases, however, may take years to reach the Court, and indeed may never be fully litigated if dangerous precedents such as the Eighth Circuit's decision are allowed to stand.

II. THE COURT OF APPEALS FAILED TO REVIEW THE RECORD IN LIGHT OF *BOSE*.

Despite its recognition of the First Amendment rights at stake, the Eighth Circuit failed to review the record independently, as this Court directed in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984). That failure not only served to further the curtailment of TCI's First Amendment rights, but also placed the Eighth Circuit in conflict with other courts of appeals that have interpreted *Bose* more broadly. (Petition at 20-22)

Central argues that the Eighth Circuit, by stating that the record contained "substantial support" for the jury's implied finding on the natural monopoly issue, and by citing to one exhibit and to testimony summarizing that exhibit, sufficiently discharged its duty under *Bose*. (Opp. at 10; *see also* App. 10a)[4] As to the contrary evidence in the record, Central's "short answer" is that "the jury chose not to believe" TCI's evidence. (Opp. at 10)

The mandate of *Bose*, however, cannot be satisfied so mechanically. Appellate courts under *Bose* are to review the *whole* record, and to exercise "independent judgment" whenever First Amendment rights are threatened. 466 U.S. at 499, 511, 514.

Nor can Central invoke the jury verdict on this issue: were that the "short answer", there would never be a need for the independent review called for by *Bose*, in that the finder of fact may always be assumed to have "chosen not to believe" evidence that conflicts with its decision. *Bose* requires courts to look beyond the fact finder, to the actual evidence in the record.

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[4] In support of this view, Central adds that "the Court of Appeals went so far as to listen to the tapes of the closing arguments of counsel at trial". (Opp. at 10 n.9) Those closing arguments, however, were of course not evidence. Moreover, the court of appeals needed to review that tape in order to rule on TCI's claim that the closing argument had been unfairly limited, not in connection with TCI's First Amendment argument on appeal.

In *Bose*, this Court specifically stated that the "rule of independent review" gives to appellate judges a "constitutional responsibility that cannot be delegated to the trier of fact," whether judge or jury. *Id.* at 501.

Significantly, the Eighth Circuit never mentions *Bose* in its opinion. Had the court addressed TCI's *Bose* argument and carried out an independent review of the record, why would the court have not so stated? That it did not say so is simply a further indication that the court of appeals failed to undertake the thorough review of the entire record required by *Bose*. Nothing in the opposition brief contradicts that conclusion.

III. THE DECISION BELOW UNDERCUTS THE *NOERR-PENNINGTON* DOCTRINE.

In the Petition, TCI acknowledged that it had done some things of which it could not be proud—as had Central and the City itself. TCI argued, however, that, with the exception of conduct by one of its employees, TCI's activities were protected by the *Noerr-Pennington* doctrine. That doctrine recognizes that even unsavory acts, such as deception of government officials, can constitute protected activity. (Petition at 22-29)

Central's response is, in reality, no response at all. Rather than confront TCI's *Noerr-Pennington* argument, Central concentrates chiefly on the conduct—threats by one employee—TCI has already conceded is not protected by the doctrine (although that conduct did not cause any injury to Central). (Opp. at 11-14)[5] TCI's showing, that the court below severely

[5] *See* Petition at 10 n.10, 29 n.41. Thus, Central's accusation that TCI believes that *Noerr-Pennington* protection extends to "death threats and similar conduct" (Opp. at 13) is simply false. Those threats constitute two of the six acts singled out at length by Central in its brief as outside *Noerr-Pennington* protection. (Opp. at 12-13) As to the remaining acts: the statements to senior citizens about shutting down TCI's system were held protected conduct by the Eighth Circuit. The alleged statements about competing technologies were not supported by the record, but certainly, if made, were misrepresentations which fell well within the range of conduct that *Noerr-Pennington* has been held to protect. Comments as to the consultant's qualifications

curtailed the doctrine, thereby impinging upon the right to petition and fostering a conflict among the circuits, is simply not addressed in any meaningful way.

Central does contend, however, that even if the bulk of TCI's activities are protected, the conceded unprotected conduct is sufficient to support the verdict. (Opp. at 13) As set forth below, that argument is circular and flouts prior rulings of this Court.[6]

IV. THE EIGHTH CIRCUIT IMPROPERLY PERMITTED THE JURY TO PILE INFERENCE UPON INFERENCE.

Central makes much of the "threats" that TCI concedes are not within the scope of *Noerr-Pennington* protection, going so far as to quote the alleged threats at length—twice. (Opp. at 2, 12) Central maintains that the jury could permissibly find that those threats—directed (as Central concedes) not at Central or the City Council but at an independent consultant hired by the City and another company, Teltran—caused harm to Central. (Opp. at 11, 13)

In order to make that causation finding here, the jury would be required to pyramid a number of inferences that are wholly without support in the record. (Petition at 29-30) This Court, however, has wisely limited the extent to which juries can draw inferences from circumstantial evidence. Those limits are necessary in order to prevent injustice, as recognized in this Court's precedents reaching back into the last century. (*Id.*) [7]

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were clearly protected opinion. Finally, TCI's withholding of the franchise fee as a set off in its lawsuit against the City also is clearly within *Noerr-Pennington*, and the Eighth Circuit itself had earlier held such "economic coercion" to be protected activity. *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 296 (8th Cir. 1978).

[6] As noted in the Petition, TCI seeks review of the fourth question presented (involving limitations on inferences from inferences), only if the Court grants the writ as to the third question presented, involving the *Noerr-Pennington* doctrine.

[7] Central urges that this Court's decisions in *Manning v. Insurance Co.*, 100 U.S. 693 (1879), and *United States v. Ross*, 92 U.S. 281

Central argues that "[t]he jury verdict can be sustained without reference" to the threats, on the basis of TCI's "other . . . conduct" not protected by *Noerr-Pennington*. (Opp. at 14) Central's position is thus obviously circular: Central need not address TCI's *Noerr-Pennington* argument, says Central, because at least the threats are concededly outside of the doctrine; yet it also need not address the inferential evidence problem posed by the threats, because the jury could rely on other conduct that is also—despite TCI's unrebutted showing in the Petition—somehow outside the doctrine. Central's failure to address TCI's *Noerr-Pennington* argument indicates that there is no "other conduct" outside of the doctrine on which to base liability. Central's reliance on such an argument simply underscores the Eighth Circuit's misapplication of the *Noerr-Pennington* doctrine, and reinforces the fact that review by this Court is both necessary and timely.

CONCLUSION

The Petition clearly demonstrates that this case presents compelling issues of great significance to the nation and to the First Amendment values at the heart of the Constitution. Nothing in the Brief in Opposition has fairly called that conclusion into doubt.

(1875), only apply when legal presumptions are relied upon to find facts. (Opp. at 14) Central is incorrect: those decisions are not so narrow. A review of the opinions makes clear that both limit the use of *factual* inferences to infer facts. As this Court held in *Ross*, "[s]uch a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of *fact* or of law is reliable drawn from premises which are uncertain". 92 U.S. at 283-84 (emphasis supplied).

For the reasons set forth above, and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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